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Supreme Court of the United States

———— TERM, 1943

NO. 128

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBER L. DINGWELL, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. BROWN,
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Supreme Court of the United States

October Term, 1943

In Bankruptcy

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBER L. DINGWELL, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To: The Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States.

Your Petitioner respectfully petitions this Honorable Court for Writ of Certiorari, to review the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled cause on March 31, 1943, which decision affirms the judgment of the United States District Court for the Southern District of Iowa, Central Division, and holds:

(a) That the Petitioner is not a farmer within the definition of Section 75-r of the Bankruptcy Act.

(b) That Debtor lost title to his real estate by the issuance of a sheriff's Deed, Petitioner having failed to secure an injunction.

(c) That cause must be dismissed for want of jurisdiction.

CIRCUIT COURT'S OPINION.

The opinion of the Circuit Court of Appeals is reported in 134 Fed. (2) 391. Adv. Sheets for May 10, 1943.

JURISDICTION.

The Jurisdiction of this court is sought to be invoked under the provisions of Section 347 of the Judicial Code, as amended by the act of February 13, 1925, (28 U. S. C. A. 347.)

In view of the importance of the question with respect to proceedings instituted under Section 75 of the bankruptcy act, and because a liberal and proper construction of Section 75r is necessary to carry out the intent of Congress, a Writ of Certiorari should be granted.

Wright vs. Bank, 300 U. S. 440.
Adair vs. Bank, 303 U. S. 350.
First National Bank vs. Beach, 301 U. S. 335.
John Hancock Insurance Company vs. Bartels, 308 U. S. 180.

STATUTES INVOLVED.

(A) 75 (r)—"For the purposes of this section, and Section 4 (b) the term "Farmer" includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

(B) 75 (n)—"The Filing of the Petition or Answer with the Clerk of Court or leaving it with the Conciliation Commissioner for the purpose of forwarding the same to the Clerk of Court praying for relief under this Section shall immediately subject the farmer and all his property wherever located for all the purposes of this section to the exclusive jurisdiction of this Court."

(C) "In all cases where at the time of filing the Petition the period of redemption has not or had not expired * * * the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this Section."

(D) "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights, and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

SUMMARY STATEMENT OF MATTER INVOLVED.

1. This cause concerns the proper construction of Section 75 (r) and (n) of the Bankruptcy Act 11 U. S. C. A., Sec. 203 (r) and (n).

2. The Petitioner is the owner and operator of a farm, and the Respondent is a mortgagee. (Tr. Pgs. 3 and 4.)

3. Petitioner acquired the farm in question by will, from his father, in which his mother owns a life estate; and acquired the real estate, a business block in the town of Adel, Iowa, under the Will from his father, on which the respondent has a mortgage. The farm land is encumbered by a mortgage in favor of the Equitable Life Insurance Company of Iowa.

4. On the 3d of June, A. D., 1941, Petitioner filed with the District Court of the United States, Southern District of Iowa, Central Division, a Debtor's Petition in proceedings under Section 75(a) to (r), of the Bankruptcy Act. The Court entered an Order approving the form of Petition, and referred it to Conciliation Commissioner Newton. The Petitioner lists in his schedules all his property including a building in Adel, Iowa encumbered by a mortgage held by Dingwell. At the first meeting of creditors, Debtor filed a proposal of composition, to which all creditors except Ding-

well assented. (Tr. Pgs. 25 to 32.) Thereupon Dingwell moved the Commissioner to dismiss the proceedings because the Petitioner was not a farmer. Upon the proof taken, the Commissioner held that he was a farmer, which was reviewed by the District Judge, and sent back to the Commissioner for further proof. On July 2, 1942, the Commissioner again held upon the proof that Debtor was a farmer.

5. Upon review taken to the District Court, on July 14, 1942, the Court held that the Debtor was not a farmer, and directed the Conciliation Commissioner to wind up the proceedings. Thereafter, Petition for Rehearing was filed by the Debtor with the District Court, asking the Court to hold the debtor was a farmer. This Petition for Rehearing was overruled.

6. After the filing of the Petition of the Debtor, the creditor, Dingwell, refused to recognize the jurisdiction of the bankruptcy court, and proceeded with foreclosure. Upon the application of the Debtor, the District Judge, on the 27th of August, 1941, entered a restraining Order, restraining Dingwell and the Sheriff from proceeding further in the foreclosure of his mortgage. On the 21st day of July, 1942, after the District Court had held the Debtor was not a farmer on review, by an ex parte Order entered by the District Court, dissolved the restraining order. Thereafter the Debtor filed a Petition with the District Court asking him to vacate this order, setting aside the restraining order, which the District Court refused to do.

7. Thereafter, an appeal was taken to the Circuit Court of Appeals for the 8th Circuit from the order of the District Court holding the Debtor was not a farmer, and from the Order dissolving the restraining Order. On March 31, 1943, the Circuit Court of Appeals for the Eighth Circuit affirmed the District Court, holding that the Debtor was not a farmer within the meaning of Section 75 (r).

8. It also held that notwithstanding the appeal to that court, the dissolving of the restraining order, and the issuance of the sheriff of a Deed, that Debtor had lost his interest in the mortgaged property in controversy, on the authority of *Hardt vs. Kirkpatrick,* 91 Fed. (2) 875 (9th Circuit).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals, 8th Circuit, is in conflict with decisions of many District Courts and with the spirit of the decisions of this Court in interpreting what is a farmer. It is in conflict with *Hamburg Bank v. Kitchens,* 116 Fed. (2) ~~276~~ 377 (8th Circuit.) And the decisions of both the District and Circuit Courts are in many instances openly conflicting.

2. In the *Beach* case *supra* the opinion states that 75-r contains "two branches" of the definition of a farmer. "They are not equivalent. They are used by way of contrast. Occasions must have been in view when the receipts of income derived from farming operations would make a farmer out of someone who personally or primarily was engaged in different activities." While this decision was liberally followed in

Williams vs. Great Southern Life Insurance Co., 134 Fed. 2nd, 38, and many others

yet in this case

Skinner vs. Dingwell, 134 Fed. 2nd, 391 and *Shyvers vs. Security etc., Bank,* 108 Fed. 2nd, 611, and many others

the court held that because of other activities the Debtor or Bankrupt was not a farmer thereby leaving no definite guide to follow in determining that question.

3. The court holds that Petitioner lost his title by allowing the Certificate of Sale to emerge into a Sheriff's Deed and dismisses his cause of action whereby the plain, clear and concise language and the intent and purpose of Sec. 75 (n) is completely overlooked or ignored. In the first paragraph therein it was the intention of Congress and it clearly states that the filing of the Petition or Answer with the clerk or even with the Commissioner to be forwarded to the clerk, subjects the farmer and all his property to the exclusive jurisdiction of the Court, the intention being to divest all others of jurisdiction or authority over the farmer's property. Next paragraph provides "That in all cases where at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or

where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section."

This paragraph clearly intended to supplement the preceding paragraph giving exclusive jurisdiction by creating an absolute moratorium whereby no rights of property could be lost in any manner or form while the proceedings were pending.

Following this it is provided in proceedings under this section * * * the jurisdiction and powers of the Courts and the jurisdiction of Appellate courts shall be the same as "if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's Petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court."

These three provisions clearly fix the status of the farmer and his property and precluded not only a loss of title by Sheriff's Deed but precluded any authority for a dismissal and necessitated the administration of the estate under these mandatory provisions by sale of the real estate through a trustee, as provided in Sec. 75 (s) (3).

WHEREFORE your Petitioner prays that a Writ of Certiorari issue under the Seal of this court directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the above entitled cause, being numbered 12180 on its docket, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by Section 347, Title 28, U. S. C. A.; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as this court may deem proper.

ALVIN EMMETT SKINNER, *Petitioner,*
R. BROWN, *Counsel for Petitioner.*

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

* * * * *

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBUR L. DINGWELL, *Respondent.*

* * * * *

OPINIONS BELOW.

Three questions are involved in this cause:

1. Whether or not Alvin Emmett Skinner is a farmer within the definition of Section 75 (r) of the Bankruptcy Act. The trial court held that he was not a farmer. The Circuit Court of Appeals held that Debtor was not a farmer, affirming the judgment of the district court for the southern district of Iowa, central division.

2. The Circuit Court held that because Sheriff's Certificate of Sale had merged into a Sheriff's Deed while proceedings were pending that Petitioner lost title to his real estate and that the subject of the controversy had passed from the jurisdiction of the Bankruptcy Court.

3. The Court affirmed the opinion of the District Court whereby the proceedings were dismissed instead of administering Petitioner's Estate as that of a Bankrupt as provided in Section 75-(n).

SPECIFICATIONS OF ERROR.

1. The Circuit Court erred in holding that Alvin Emmett Skinner, under the facts in the record, was not a farmer within the definition of section 75 (r).

2. The Court erred in holding that because the Sheriff's Certificate of Sale had merged into Sheriff's Deed the subject of the controversy had passed from the jurisdiction of the Bankruptcy Court.

3. The Court affirmed the opinion of the District Court whereby the proceedings were dismissed instead of admin-

istering Petitioner's Estate as that of a Bankrupt as provided in Section 75-(n).

ARGUMENT.

There are three issues here involved growing out of the opinions in the District and Circuit Court. As heretofore stated on page 1 they are (a) Petitioner is not a farmer. (b) While proceedings were pending he lost title to his real estate by Sheriff's Deed. (c) Dismissed as Bankruptcy Court was without Jurisdiction.

AS TO (a)

The Circuit Court states that income from sources other than the farm is $5533.98. The income from the farm, $2,-828.09 for 1940. In this computation the court includes the cost of furnaces, plumbing and other material, total, $3,-221.51. Deducting this cost leaves income, $2312.47 (Tr. 44) or $515.62 less than farm income. The opinion of the District Court indicates the same error. The record shows that Petitioner had a life estate in 140 acres of highly productive Iowa land, owned other real estate, (Tr. pg. 3), owned live stock, farm machinery and farm products, $5345.00. (Tr. Pgs. 6 & 7). In 1940 produced $2828.09. In 1941, $3497.76. (Tr. pgs. 44 and 45). Lived in Adel but supervised and managed all operations on this farm from his father's death in 1932 devoting about two months of his time exclusively to work thereon, the remainder in selling furnaces, repairing same and operating an improvised saw mill in all of which he had an investment of about $1500.00. (Tr. 6 & 7). As Petitioner, because of his experience possessed a much greater earning capacity in the sale and installation of plumbing and heating than he had as a farm laborer he devoted more of his time to the more profitable vocation employing less skilled and expensive labor to carry on the farm work and the operation of the saw mill. In years of Depression and drought the profits of the farm had been greatly reduced. To save it something had to be added to that which it would produce. To add that something Petitioner engaged himself otherwise and with an investment of but $1500.00 he was able to secure a net return not great-

ly less than the return from the farm in which the investment was many times greater. Had Petitioner not engaged in these additional activities but had lived on the farm and devoted all his time to labor thereon clearly his being a farmer could not possibly have been open to question or doubt. The fact that he, in order to save his life estate in the farm and the title of remainderman therein through the years of depression and drought through other activities added very substantially to is net income, did that change his vocation? Does the exercise of intelligence and efficiency in the struggle to save the loss of a farm change the vocation? The fair market value of the farm with all farm equipment owned in connection therewith the investment represented is not less than $20,000.00. The investment in the furnace business, etc. was about $1500.00. In view of the above facts as disclosed by the record can it be that farm owners such as this Petitioner was not intended to be included in Section 75 and were not intended to be afforded it's protection? Here Petitioner is a farmer if the following cases and many others which could be cited are correct pronouncements of the law.

First National Bank and Trust Co. vs. Beach, 301 U. S. 435.

Hamburg Bank vs. Kitchens, 16 Fed. (2) 337 (8th C. C. A.).

Leonard vs. Bennett, 116 Fed. 128 (9th C. C. A.).

Chaney vs. Stover, 123 Fed. (2) 946 (4th C. C. A.).

Williams vs. Great Southern Life Insurance Co., 124 Fed. (2) 138 (C. C. A. 5th).

First State Bank of Stratford (Texas) vs. Roach, 124 Fed. 325 (C. C. A. 5th).

but an equal number of cases could be cited both of the District and Circuit Courts in which the above decisions are stricken down and on records even more favorable debtors and bankrupts are adjudged not to be farmers and their cases dismissed. Because of this hopeless confusion Certiorari should be granted.

AS TO (b) and (c)

The Circuit Court held that it had lost jurisdiction because the Certificate of Sale had merged in a sheriff's Deed

and as it had thus lost jurisdiction the proceedings were dismissed. A careful reading of Section 75 and amendment thereto clearly presents a program for the relief of distressed farmers. Paragraph (n) presents that plan by first providing that the filing of the Petition or leaving it with the Commissioner subjected the farmer and all his property to the exclusive jurisdiction of the Court. In so providing they immediately afforded the farmer protection against being destroyed by creditors enforcing obligations. Second. It was well known that thousands of farmers had suffered foreclosure, that the issuance of sheriff's deeds threatened them therefore to retain the status quo of the farmer as against loss of title it was provided that the filing of the Petition should extend the period of redemption for the *period necessary to carry out the provisions of this section.* These two provisions clearly gave him as a farmer, full protection but in event it were found he was not a farmer upon the dismissal of the proceedings the right of redemption would expire. To give the farmer some opportunity to still save his farm they added the last paragraph providing that his status should be the same as if a voluntary Petition for Adjudication had been filed and *a decree of adjudication had been entered.* In paragraph (s) 3 provision is made for 90 days in which to redeem from a sale and for a sale in event the farmer could not make redemption as provided therein. Congress never intended Bankrupt farmers should furnish injunction bonds to save their farms.

This orderly program is stressed and declared mandatory in

John Hancock Insurance Co. vs. Bartels, 308 U. S. 18.

Borchard vs. California Bank, 310 U. S. 311.

an extended argument by Petitioner can neither add to or detract from the plain, concise language of said paragraph (n) nor is such necessary to disclose the triple purpose of said Section. The Circuit Court cites

Hardt vs. Kirkpatrick, 91 Fed. (2) 875 (9th C. C. A.).

That case was decided July 26, 1937. Just how it can now be harmonized with the subsequent decisions of this court is most difficult to understand. It is a sufficient Answer to cite the clear and explicit provisions in Par. (n) in pursuance of which the Court took exclusive jurisdiction of the

property, the right of redemption was stayed for the purpose of carrying out the provisions of this Section and the status of the Petitioner was that of an adjudicated Bankrupt. These proceedings are still pending. The purpose of the Section has not been carried out as the right of rehearing, appeal and certiorari have not expired.

MacKenzie vs. Engelhard Co., 266 U. S. 131, 36 A. L. R. 416.

Brannon vs. Commonwealth of Kentucky, 162 Ky. 350.

State vs. Tugwell, 19 Wash. 238.

Bloom v. People, 23 Colo. 416.

If the provisions of this Section have not been carried out the Deed issued is absolutely void and they have not been carried out as this Court can take jurisdiction, reverse the Circuit Court and adjudge Petitioner entitled to the benefits of the Section. As Sub Sec. (s) is an amendment to Section 75 the two must be construed together as one enactment. Sub Sec. s (3) provides "If however the Debtor at any time fails to comply with the provisions of this Section or with any Order of Court made in pursuance of this Section" the Court may Order the real estate sold as provided therein, viz. a right by debtor to redeem for 90 days. The fact that Petitioner was adjudged not a farmer did not change his status as an adjudicated Bankrupt under Paragraph (n). As he was adjudged not a farmer he could not comply in that respect "with the provisions of this Section" therefore it became the duty of the Court to sell his land as provided in sub sec. (s) 3 as it had jurisdiction of the land the right of redemption remained and the Petitioner's status quo was that of an adjudicated Bankrupt whereby of necessity the Court had no authority to dismiss his proceedings and the Court had no authority to say a valid Sheriff's Deed had been issued or that it could deny itself of the mandatory statutory duty of carrying out the provisions of the Act as this Court declared must be done in the *Bartel and Borchard* cases, *supra*. The Circuit Court in citing the *Hardt* case, *supra* apparently relied on what is there said and assumed that because Sub Sec. s (2) provided for a three years stay that no stay prior thereto existed. Section 75 as originally enacted provided for the stay until the provisions of the Act was carried out in behalf of the farmer.

The Supreme Court was authorized to issue rules of procedure and did issue a rule that the proceedings under Sec. 75 should be completed in 90 days. When Sub Sec. (s) was added the objective was to provide a three year moratorium. Necessarily in providing this period of moratorium it was necessary to state the time which was fixed at three years, therefore Sub Sec. s (2) specifically provides for the three year moratorium and the stay of judicial proceedings during that time. The three years stay was an addition to the stay under Sec. 75 as proceedings under that Sec. were to be concluded in 90 days. To preclude any contention that the stay under Sec. 75 terminated with the proceedings under that Section, clearly all doubt was removed by specifically providing that when the Court took jurisdiction under the amendment an Order should be entered extending all rights for the three years. But since Sub Sec. (s) amends Sec. 75 the two become but one act and therefore since the amendment extended the procedure then all the provisions of Sec. 75 necessarily applied thereto,

Baxter vs. Savings Bank, 92 Fed. (2) 405 (5th C. C. A.)

which was cited and considered an important case in the Circuit Court because in that case an amended Petition had been filed asking to be adjudged a Bankrupt and held because of that Debtor was entitled to have his estate administered as an ordinary Bankruptcy proceedings. It was not necessary for the Court to base its decision on the prayer of the amended Petition since the last paragraph in (n) fixed the Debtor's status as an adjudicated Bankrupt. The Circuit Court distinguished and refused to follow the *Baxter* case because here no amended Petition had been filed. In doing so it wholly ignored the status of Petitioner as that of an adjudicated Bankrupt under (n). The status of a farmer and his property are so clearly fixed in Section 75 (n) that further argument here could not add anything thereto. There all proceedings against his property is stayed, he is an adjudicated Bankrupt and the Circuit Court committed error in holding that he lost title to his real estate and that it was without jurisdiction to administer upon his estate as such adjudicated Bankrupt and as provided in 75 (s) 3 as he was unable to comply with the provisions therein viz. qualify as a farmer.

CONCLUSION.

That the decisions of the Circuit Courts as to what constitutes a farmer are unquestionably in hopeless variance. They can not possibly be harmonized. Recent decisions holding that the Debtor must be actually personally engaged in agricultural labor, others holding otherwise, some holding the principal income must be derived from personal labor, others from rental whereby the decisions are in hopeless conflict. There seems to be no case to be found where the last paragraph of 75 (n) fixing the status of a Debtor as an adjudicated Bankrupt was ever given judicial consideration. The cases wholesale were dismissed under Sec. 75 if adjudged not to be a farmer and the farmer's title lost. Many times proceedings under Sec. 75 continued far beyond the 90 days during which time the statutory year of redemption expired. In all those cases just as in the case here the proceedings were dismissed, the farmer's title lost and he financially destroyed. It is the more important now as the price of farm products and land have very substantially recovered and a very large percentage can now refinance within the 90 days. As the question here presented under (a) and (b) have not heretofore been judicially considered but completely ignored and the plain, positive provisions of Sec. 75 (n) have been wholly denied Debtor this Court should grant Certiorari.

Respectfully submitted,
R. Brown, *Counsel for Petitioner.*

APPENDIX.

OPINION OF TRIAL COURT.

DEWEY, D. J.

"In the above entitled matter a secured creditor has challenged the jurisdiction of this bankruptcy court to continue these proceedings on the ground that the debtor is not a farmer.

By an order of this court dated November 24, 1941, in which the same question was at issue, this court determined that under the evidence the sole question was whether "the principal part of the debtor's income was derived from farming operations," and the matter was remanded to the conciliation commissioner to determine that question. Such a hearing was held before the commissioner and he determined by written order dated July 2, 1942 that the debtor was "bona fide personally engaged in farming," and denied the application to dismiss on account of jurisdiction.

The evidence taken before the commissioner on this latter hearing was preserved and is before the court. It is therefore disclosed that the debtor lives in the town of Adel, Iowa, and operates a plumbing and heating business and also a saw mill. In addition, he receives rentals from a residence property and a store room. He rents and operates through a tenant a farm of 140 acres owned by his mother and which has been in the family for many years. He worked some on the farm during the planting (fol. 76) and harvesting seasons. His net income from the farming operations does not equal the net income that he received from his store, saw mill and rentals.

While the order of this court directed the commissioner to determine the one question of whether the debtor was a farmer in that the principal part of his income was derived from farming operations, the commissioner did not so determine but places his denial of the dismissal on the ground that the debtor was a farmer within that part of the definition of a farmer contained in the act (Sec. 75-r) that provides that, "The term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil." However, the commissioner did not find that he was "primarily" so engaged in produc-

ing products of the soil but that he was "bona fide personally engaged in farming."

I agree with the commissioner that the evidence does disclose that he was to some extent "personally engaged" in farming, but the definition contained in the statute requires not only that he be so engaged in farming but also that he was so engaged "primarily." The word primary means: chief or principal; so that to be a farmer within the definition of the act the debtor must not only be personally engaged in farming but the farming must be "primarily" his business.

A reading of the evidence discloses that farming is not the debtor's primary business, but that his primary business is that of operating and owning a store in the town of Adel, Iowa, and running a saw mill. His operations of farming are secondary and incidental.

The objecting creditor having duly asked for a review of the order of the commissioner dated July 2, 1942, and the same being submitted by agreement of the parties, the court finds that the commissioner is clearly erroneous in his finding that under the evidence the debtor is a farmer (fol. 77) within the definition contained in the act and that said order will have to be set aside. The clerk will therefore enter the following order:

The above entitled matter coming on for hearing on a petition to review an order entered by the conciliation commissioner on July 2, 1942, finding and determining that the debtor is a farmer, and the same being considered;

The court finds that such order was erroneous in that under the evidence the debtor is not a farmer. Said order of the commissioner of date, July 2, 1942, is therefore set aside and the commissioner ordered and directed to enter an order finding the debtor is not a farmer and proceed to wind up the administration of this estate. To all of which the debtor, Alvin Emmett Skinner, excepts.

Signed at Des Moines, Iowa, this 14th day of July, 1942."

OPINION ON PETITION FOR REHEARING.

DEWEY, D. J.

"The above entitled matter coming on for hearing upon the Petition for Re-hearing of Order made by the court on

July 14, 1942, and also upon the application to vacate an Order to Restore Restraining Order; the same being argued and submitted; said Petition for Re-hearing is overruled. And the Application to Vacate an Order and Restore Restraining Order, is also overruled. To all of which Alvin Emmett Skinner, farmer-debtor excepts."

CIRCUIT COURT OPINION.

"GARDNER, Circuit Judge.

This is an appeal from an order of the trial court sitting in bankruptcy, holding the debtor not to be a farmer. Appellant filed his Petition seeking an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act, 11 U. S. C. A. Sec. 203. He alleged that he was engaged primarily in farming operations and that he personally supervised and operated a 140-acre farm, describing it, situate in Dallas County, Iowa, and that he was unable to meet his debts as they matured. He attached a schedule containing a statement of his debts, with the names and addresses of his creditors, and a schedule containing an inventory of his property, with further statements concerning the character of the debts and the property, listing secured claims of $34,108.99 and unsecured claims of $287.58, and assets covered by creditors' liens appraised at $31,306.59. The petition, having been approved by order of court, was referred to a conciliation commissioner for further proceedings. At the first meeting of creditors, the debtor submitted offer of composition and extension of time of payment of his debts, both secured and unsecured. This offer may be briefly summarized. It specifically named each creditor and offered to pay such creditor, both the secured and unsecured, in full, with the following exceptions; to-wit, "That he offers to pay the secured creditor, Wilbur L. Dingwell, for judgment growing out of foreclosure proceedings in Dallas County, Iowa, in No. 14, 946 Equity, said judgment having been rendered in foreclosing a first mortgage as set out in schedule A-2 of the debtor's petition, the sum of $9,300.00, payable on or before July 14, 1944, with interest at 6% annually from this date." Reference to the schedule indicates that at the date

of filing the petition there was due on this judgment $11,-388.41.

Responding to the debtor's petition and offer of composition, appellee, as a secured creditor, filed answer alleging the entry of a decree of foreclosure of the mortgage owned by him and the sale of the real estate described therein, which was town property described as the West one-third of Lot 1 and the East twenty-two feet of Lot 2, Block 16, in the Town of Adel, by virtue of a special execution and that he had bid the property in and that the mortgage had merged into a sheriff's certificate of sale issued to him; that the debtor had obtained title to the real estate covered by said mortgage, subject to the mortgage, but he had not signed the note and mortgage and was not personally liable for the debt nor had any personal judgment been rendered against him in the foreclosure action; that the debtor was not entitled to a composition or extension under the provisions of Section 75 of the Bankruptcy Act for the reason that he was not a farmer nor engaged in agricultural occupation but was a merchant and had been operating an implement and hardware store in the Town of Adel, Dallas County, Iowa, for many years and was still engaged in that business; that he owned no farm land, did not reside on any farm real estate and merely had a life estate in a farm, subject to the life estate of his mother.

The issue raised by the answer of Dingwell was tried before the conciliation commissioner, resulting in a finding that the debtor was a farmer. On review, the trial court sent the matter back for further proof and a supplemental hearing was held before the commissioner who again held that the debtor was a farmer within the meaning of Section 75 of the Bankruptcy Act. The court reversed this holding of the commissioner, finding that the debtor was not a farmer. This finding by the court is challenged by appellant on this appeal. There is no material conflict in the evidence. All of the debtor's creditors, except appellant, accepted the debtor's offer of composition, as it seems they were bound to do because it proposed to make payment in full in accordance with his implied obligation as to the unsecured creditors. The only debt about which there is any controversy is that created by the mortgage indebtedness covering town property acquired by the debtor subject to that mort-

gage. It has nothing to do with any mortgage lien upon farm lands of the debtor.

(1) The burden of proving that the debtor was a farmer rested upon him as he was seeking relief which the court had jurisdiction to grant only in the event that he was, within the meaning of Section 75 of the Bankruptcy Act, a farmer. *McLaughlin Land & Livestock Co. vs. Bank of America Nat. Trust & Savings Ass'n*, 9 Cir., 122 F. 2d 193; *Mulligan vs. Federal Land Bank of Omaha*, 8 Cir., 129 F. 2d 438.

The debtor had lived in the Town of Adel some forty years. From 1909 to the date of his father's death in 1932, he worked with his father in the implement and hardware business. After his father's death, as executor under his father's will, he operated the store in Adel and the farm for some five years. His father, at the time of his death, was the owner of a lumber yard in addition to the hardware and implement business. Debtor, for some reason not disclosed, ceased to be executor under his father's will after having acted as such for some five years, but he continued to operate a store, engaged in plumbing and heating, and operated a saw mill located at the rear of the store room. He worked as a plumber, sold and installed furnaces, and advertised in the local paper for such work. He testified, "I did most of the labor, installing furnaces and plumbing, and fixing oil burners." He has been operating the store in Adel continuously since January, 1940. As to his farming operations, he testified as follows: "In Schedule B-2 stock and trade, merchandise and supplies at $500.00. That's the stock that I have in the store, for sale in the regular course of business. I have been operating the store since I filed the petition. I have some shelving and fixtures in the store. They are listed as personal property. When I filed the schedules, I just estimated in the inventory. The money from the merchandise I have sold, I have put in the bank, which was probably used to pay bills since I filed this petition. I have done some other work since I filed the petition, sold a furnace and installed it. I have another on the way. I have another way of making money, by operating a saw mill."

Among the secured claims was a mortgage on the farm involved, but the debtor agreed to pay that indebtedness in full as he offered also to pay other creditors except appel-

lee. He has a lease on the farm from his mother who owns a life estate therein, by the terms of which he agrees to pay the taxes, the interest and installment of principal of the mortgage. He operates the farm by hired help with the exception of fifty or sixty days which he spends personally on the farm during the course of the year. While not working on the farm he spends his time operating his business in town. His total gross income from his farming operations during the year in question was $2,828.09, while his expense including rent, amounted to $1,842.50, leaving a profit of $985.59. This allows no depreciation on farm machinery. His total income from his operations in town amounted to $5,533.98, and his total expenses in connection therewith amounted to $4,074.81, leaving a net profit from these operations of $1,459.17.

(2-4) The Act was intended to give relief to those engaged in agricultural pursuits as a livelihood or business. To come within the classification of farmer, one must devote the major portion of his time to at least one of the activities named in the act, or the principal part of his income must be derived from such farming operations. As said by us in *Federal Land Bank of Omaha vs. Wood*, 8 Cir., 129 F. 2d 89, 91: "Whether or not the appellee is a farmer within the purview of this act must be determined by the facts and circumstances in this case 'viewed in combination,' and the character of the enterprise in which she was engaging determined by 'the totality of its circumstances.' "

(5) That appellant did not devote a major portion of his time to farming operations is conclusively shown by his own testimony to the effect that he spent about fifty or sixty days during the year in such activities. The balance of the time he devoted to his business in town. He had resided in town and been engaged in business there for many years before the filing of his petition. His farming activities did not, we think, ever become his primary business. More than 80 per cent of his time was devoted to conducting a store and in connection therewith to selling and servicing furnaces and selling hardware. In addition to this he operated a saw mill and did plumbing. Neither can it be said that the principal part of his income was derived from his farming activities.

It is to be observed as a circumstance tending to indicate

the debtor's own view as to his occupation that in the schedules filed he listed certain livestock and certain agricultural machinery and implements. He also listed a saw mill outfit, his residence property in Adel, plumbing tools, and an automobile. He did not claim a farmer's exemption, including the farming implements and livestock, which he could have done under Section 11760 of the Code of Iowa, but instead he claimed as exempt his saw mill outfit listed at $500, woodworking tools listed at $150.00, a planer listed at $50, plumbing tools listed at $100, and automobile listed at $75, and his home in Adel.

The facts in this case present an unusual situation. There is no deficiency judgment against the debtor, as he did not sign either the note or the mortgage. Appellee claims no lien on the 140-acre farm as against appellant, or his rights therein. There is no claim that appellant's mother, who owns the life estate in the farm was a farmer, and she is not a party to this proceeding. When the proceeding was commenced the mortgage on the business property had been foreclosed and the property sold to appellee who held a sheriff's certificate of sale. It was admitted on oral argument that there was no injunction subsequent to the decision of the lower court ordering the proceeding dismissed. The lower court directed the conciliation commissioner to enter an order finding the debtor not to be a farmer and to proceed to wind up the administration of the estate. Thereafter the court vacated an injunction against the issuance of a sheriff's deed.

The certificate of sale or purchase held by appellee has merged into a sheriff's deed, vesting title to the mortgaged property in him. The deed having issued while no injunction was in force, nor applied for, appellant's interest in the mortgaged property has been terminated. *Hardt v. Kirkpatrick*, 9 Cir., 91 F. 2d 875. Even if it could properly be held that appellant was a farmer, he has permitted the subject of this controversy to pass from the control or jurisdiction of the bankruptcy court.

We are of the view that the court correctly held that the appellant is not a farmer and the order appealed from is therefore affirmed."

(23)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 128

IN BANKRUPTCY.

ALVIN EMMETT SKINNER, *Petitioner*,

vs.

WILBUR L. DINGWELL, *Respondent*.

RESISTANCE AND ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF OF RESPONDENT IN SUPPORT THEREOF.

VINCENT STARZINGER, of Des Moines, Iowa,
ROBERT J. BANNISTER, of Des Moines, Iowa,
RUSSELL K. CRAFT, of Adel, Iowa,
Attorneys for Respondent.

STIPP, PERRY, BANNISTER & STARZINGER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.....

IN BANKRUPTCY.

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBUR L. DINGWELL, *Respondent.*

RESISTANCE AND ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To: The Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Your respondent, Wilbur L. Dingwell, respectfully asks this Honorable Court to deny the Writ of Certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled cause on March 31, 1943, which decision confirms the judgment of the United States District Court for the Southern District of Iowa, Central Division.

STATEMENT OF FACTS.

1. The statement of facts by the appellant, Alvin Emmett Skinner, in the Appellant's Brief and Argument filed in the United States Circuit Court of Appeals was so distorted and colored as to make necesssary a restatement of facts by the appellee. Again it becomes necessary to make such a restatement of facts.

2. The petitioner is not the owner and operator of a farm but merely has a contingent life estate in a farm with his sister, the life estate for the petitioner and his sister being subject to the life estate of their mother, who is still living, and said petitioner rents said farm from his mother, the present life tenant. The respondent has absolutely no interest in the farm real estate, but held a mortgage on a business building situated in the Town of Adel, Iowa.

3. The petitioner lived on a farm when he was a boy, but has not lived on a farm for more than forty-one years. He has lived in the Town of Adel, Iowa, for the past forty-one years with the exception of two years, from 1907 to 1909, when he lived in Chicago. (R. 15.) From 1909 to the date of his father's death in 1932, he worked with his father in the implement and hardware business in Adel. After that, as executor of his father's estate, he operated the store and the farm, and everything connected with the estate for five years. His father had a lumber yard in addition to the hardware and implement business. (R. 15.)

After appellant ceased being executor of his father's estate, he continued to run the store in the same storeroom (R. 15), and he also engaged in the plumbing and heating business. Sold and handled harness (R. 40) and operated a sawmill located back of the storeroom. (R. 16.) He does plumbing work, furnace work, and advertises in the paper for such work. (R. 16.) He testified, "I did most of the labor, installing furnaces, and plumbing, and fixing oil burners". (R. 40, bottom of page.) He kept open the storeroom in Adel equipped with counters and shelving and has been operating

this store continuously since January of 1940. (R. 16.) The following is from his testimony before the conciliation commissioner: "In schedule B2, stock in trade, merchandise and supplies, at $500.00. That is the stock that I have in the store, for sale in the regular course of business. I have been operating the store since I filed the petition. I have some shelving and fixtures in the store. They are listed as personal property. When I filed the schedules I just estimated the inventory. The money from the merchandise I have sold, I have put in the bank, which was probably used to pay bills since I filed this petition. I have done some other work since I filed the petition, sold a furnace and installed it. I have another on the way. I have another way of making money, by operating a sawmill." (R. 18.)

This proceeding in no way involved the farm he is renting. The appellant agreed to pay the indebtedness in full on the farm (R. 10; 27), and to pay every other creditor in full, except this appellee. (R. 10 and 11.)

The appellant did not take his exemptions out of his farming personal property, but in plumbing tools and the sawmill. (R. 8.) The Iowa exemption statute is Section 11760 of the Code of 1939, which provides:

> "If the debtor is a resident of this state and the head of a family, he may hold exempt from execution the following property:
>
> "6. Two cows and two calves.
>
> "7. Fifty sheep and the wool therefrom and the materials manufactured from such wool."
>
> "9. Five hogs, and all pigs under six months.
>
> "10. The necessary food for all animals exempt from execution for six months."
>
> "17. The *proper tools*, instruments, or books of the debtor, if a farmer, *mechanic*.
>
> "18. If the debtor is a * * * farmer, teamster, *or other laborer*, a team * * * and the wagon or other vehicle, with the *proper harness or tackle*, by the use of which he habitually earns his living." (Italics are ours.)

His lease is a peculiar one in this: in it he agrees to pay the taxes and interest and installment of principal on the mortgage, whether he makes it out of the farm or not. (R. 17.)

The debtor leases the farm from his mother, who owns a life estate and then operates said farm by hired help, with the exception of fifty or sixty days which he spends on the farm during the course of a year. (See R. 17.)

When he is not working on the farm, he is spending his time operating his business. (See R. 18.)

The gross sales from the farm were $2,828.09, and total expenses were $1,842.50, which leaves a profit of $985.59, as shown by Exhibit "D-2". (R. 44.)

The depreciation on farm machinery in the sum of $106.50 (R. 40) was not deducted as an item of expense, and after making such deduction there would be a net profit on the farm in the sum of $879.09.

Said debtor has the fixtures, plumbing tools, merchandise and sawmill which formerly belonged to his father, and the debtor keeps a store, makes purchases and sales in connection with operating said store, does plumbing work, furnace work, and advertises in the paper for such work, and has been operating said store continuously since January of 1940. Most of his business consists of plumbing and heating. (See R. 16.)

Said debtor keeps a stock in said store for sale in the regular course of business and has been operating the store since the filing of his petition. (See R. 18.)

The total sales in debtor's mercantile, plumbing, and heating business amounted to $4,737.58; the total purchases $3,221.51; total expense $733.72, thus leaving a net profit of $811.15. (See Exhibit "D-2", R. 44.)

In addition he operated a sawmill, situated at the rear of the store building, for which he received $339.00, and also had $150.00 income from a residence property during 1940, and $278.60 on the building located on Block 16, Adel, Iowa. From the rents collected, said debtor paid $119.58 for taxes,

coal and expenses, thus making his total net income from sources other than farming the sum of $1,459.17. (See R. 41.)

Therefore the total gross income of the debtor from his farming operation was $2,828.09, which was the total sales, including the total sales of all grain, livestock raised on farm, as well as the increase in the inventory in the sum of $435.00. From said sum have been deducted the expenses, including rent in the total sum of $1,842.50, leaving a profit in the sum of $985.59, less $106.50 depreciation on farm machinery, or a net profit of $879.09.

Set out in tabular form, debtor's income from operations other than farming is as follows:

Total sales	$4,737.58
Received from rent	428.60
Received from running sawmill	339.00
Increased inventory	28.80
Total gross income from other business	$5,533.98
Expenses:	
Purchases	$3,221.51
Expense of operating business	733.72
Taxes and other expense	119.58
Total expenses of other business	$4,074.81
Total income from other business brought forward	$5,533.98
Total expenses of other business brought forward	$4,074.81
Net profit from other business	$1,459.17

It can readily be seen by the facts that the foreclosure of the mortgage on the business property situated in Adel had no connection with the farm or the operation thereof in which the petitioner holds a contingent life estate with his sister, subject to the life estate of their mother.

REASONS RELIED ON FOR DENYING THE WRIT.

I.

Decision of Circuit Court of Appeals for the Eighth Circuit is not in conflict but in harmony with the decisions of many District Courts and with the spirit of the decisions of this Court in interpreting who is a farmer.

II.

The petitioner is not a farmer under any definition stated by this Court or any other Court of Appeals.

First National Bank v. *Beach*, 301 U. S. 435.
Shyvers v. *Security Bank*, (9th Cir.) 108 F. (2) 611.
In re Lindsay, (D. C. Texas 1941) 41 F. Sup. 948.
In re Henry Joyce, (D. C. La. 1941) 36 F. Sup. 113.
In re Prudhomme, (D. C. La.) 24 F. Sup. 155.
In re Day's Estate, (D. C. E. D. Illinois) 10 F. Sup. 229.
In re Hilliker, (D. C. S. D. Cal.) 9 F. Sup. 948.
Federal Land Bank of Omaha v. *Wood*, (C. C. A. 8) 129 F. (2) 89.
Benetez v. *Bank of Nova Scotia*, (1st Cir. 1942) 125 F. (2) 523.
In re Beechwood, (D. C. N. J.) 42 F. Sup. 401.
Williams v. *Great Southern Life Insurance Co.*, (5th Cir.) 124 F. (2) 38, 40.

III.

The burden of proving the facts necessary to sustain the jurisdiction of the Court rests on the petitioner.

McNutt v. *General Motors Corporation*, 298 U. S. 178.
McLaughlin Company v. *Bank*, (9th Cir.) 122 F. (2) 193.
In re Chaney, (D. C. W. Va.) 39 F. Sup. 696, 700.
Mulligan v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.

IV.

When a sheriff's deed has issued pending the proceedings and when no restraining order was in force and the debtor has lost interest in the property, the proceedings will be dismissed.

Hardt v. *Kirkpatrick*, 91 F. (2) 875.
In re Cox, (D. C. Idaho) 22 F. Sup. 925.
Federal Land Bank v. *Davis*, 128 F. (2) 435.
McLean v. *Federal Land Bank*, 130 F. (2) 123.

V.

The Court, not possessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act.

Mulligan v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.
Baxter v. *Savings Bank of Utica*, 92 F. (2) 404.
Cresap v. *Equitable Life Assurance Society of U. S.*, (7th Cir.) 99 F. (2) 722.

A. The appellant having filed no such designation cannot urge this point.

Rule 75d, Rules of Civil Procedure.

The question was not one of the points designated. (Record, page 71.)

WHEREFORE your respondent respectfully asks that the Writ of Certiorari be denied by this Honorable Court, and for such other and further relief as this Court may deem proper.

WILBUR L. DINGWELL, Respondent.
VINCENT STARZINGER,
ROBERT J. BANNISTER, and
RUSSELL K. CRAFT,
Attorneys for Respondent.

STIPP, PERRY, BANNISTER & STARZINGER,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBUR L. DINGWELL, *Respondent.*

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING:

1. That Alvin Emmett Skinner, out of the facts of the record and the law applied thereto, was not a farmer.

2. That because the sheriff's deed was issued while no injunction was in force, nor applied for, the subject of the controversy had passed the jurisdiction of the Bankruptcy Court.

3. The Circuit Court of Appeals was correct in affirming the opinion of the District Court, as the Court, not posessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act, and the petitioner having filed no such designation cannot now urge this point.

ARGUMENT.

I.

The appellant was not a farmer.

It is clearly established that each case, as to whether a debtor is a farmer or not, must depend on its peculiar facts and to have such a status, an individual must be primarily en-

gaged in farming. *First National Bank* v. *Beach*, 301 U. S. 435.

It certainly cannot be successfully maintained, that Skinner was primarily engaged in farming when according to his own testimony, he spent but fifty or sixty out of three hundred working days in each year in his farming activities and two hundred fifty of them at working at his business in town. *Benetez* v. *Bank of Nova Scotia*, (1942) 125 F. (2) 523; *First National Bank* v. *Beach*, 301 U. S. 435; *Shyvers* v. *Security Bank*, 108 F. (2) 611.

Obviously, the labor of appellant for 83⅓% of his time does not "smack" of the soil. See *First National Bank* v. *Beach*, 301 U. S. 435.

In the language of the Supreme Court in the case last above cited:

> "Either the debtor posing as a farmer was engaged at the same time in some other line of business or the plots in cultivation were too small to make a farm, and in such a case the court holds that he was not within the statutes."

Also the following from the *Beach* case is important:

> "The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable, *the major portion of his time.*" (Italics ours.)

The 9th Circuit Court of Appeals in the case of *Shyvers* v. *Security Bank*, (9th Cir.) 108 F. (2) 611, very carefully analyzes the *Beach* case. In the *Shyvers* case the debtor claiming to be a farmer derived all of her income from farming, but she had no personal activities on the farm, and the court held she was not a farmer, saying:

> " 'It should be noted in particular that the Act does not define a farmer as one whose principal income is derived from farm properties; but the definition instead refers to "the foregoing operations".

"'What are the "foregoing operations"? An examination of the statute will disclose that each "foregoing operation" is meticulously required to be a personal one. We conclude that to come within this subdivision, the debtor must personally be engaged in farming. It is not enough to own farm lands which he or she leases to others who operate them, while the debtor resides across the seas. And this appears to be the very spirit of the law, which was enacted during a period of profound depression among the farmers of this country, the Act itself providing that it is one of emergency.'"

The Circuit Court of Appeals for the 8th Circuit in *Federal Land Bank of Omaha* v. *Wood*, 129 F. (2) 89, holds that a school teacher, owning and leasing land to tenants in the State of Nebraska, is not a farmer, and says:

"Each case must be determined on its own individual facts and circumstances."

It has been held that the purpose of the alternative portions of the definition in Subsection *r* of this section of the statute is to prevent additional personal operations from defeating a debtor's status as a "farmer", provided debtor's principal income continued to come from debtor's personal farming operations. *In re Joyce*, (D. C. La. 1941) 36 F. Sup. 113.

In re Beechwood, 42 F. Sup. 401, was a case where a lawyer and a business man who resided on a farm and devoted his Saturday afternoons, Sundays, and leisure time to farming operations and where he ran the farm by hired help was not a farmer, the court saying:

"The exceptional benefits provided for farmers under the Bankruptcy Act were designed for the protection of those who in good faith seek their livelihood from the soil. Such workers engage in a totally essential employment beset by many economic risks and hazards and when personally engaged, even under most advantageous conditions, are required to exert themselves with utmost vigor for most modest returns. None but those for whom the statutory privilege was created should be permitted to insinuate themselves into the class."

The following from *Williams* v. *Great Southern Life Insurance Company,* (5th Cir.) 124 F. (2) 38, at page 40, is in point:

> "He does not become a farmer by merely receiving rents or revenues without more, where he has another business in which he is primarily engaged, although such rents and income may exceed that of such other business or occupation."

In the following from *In re Chaney,* (D. C. W. Va.) 39 F. Sup. 696, we find the word "primarily" defined:

> "It seems certain, however, that the use of the word *primarily* engaged means that the alleged farming operation must be the primary activities of the debtor and not a mere sideline to some other more important, lucrative and time-engaging occupation, and that when reference is made to the *principal part* of the debtor's income it is meant that one whose real means of livelihood is derived from some other source cannot obtain the protection of this act merely by dabbling in agricultural pursuits even though some income be derived therefrom." (This case was reversed by the Circuit Court of Appeals, but the definition of the word *"Primarily"* was not criticized or referred to in the opinion of the appellate court.)

Where debtor was a lawyer and operated a farm and his income as a lawyer was $1,000.00 a year and from the farm $450.00 a year, held he did not derive his principal source of income from farming and was not "primarily engaged in producing products of the soil". *In re Prudhomme,* (D. C. La.) 24 F. Sup. 155.

In re Day's Estate, (D. C. E. D. Illinois) 10 F. Sup. 229, it was held that a civil engineer who owned a farm and derived one-half of his income from the farm was not a farmer. The court said:

> "The court is of the opinion that there is little distinction between the phrase 'engaged chiefly in farming' and that of 'personally * * * engaged primarily in farming' or that of 'principal part of whose income is derived from farming operations.' Principal means main, chief, of first importance."

In re Hilliker, (D. C. S. D. Cal.) 9 F. Sup. 948, holds that a practicing dentist who derived the largest part of his income from a citrus ranch, was not a farmer.

The following cases cited by appellant, when analyzed, are not in conflict with the principles announced in those cases already discussed.

First State Bank of Stratford v. *Roach*, 124 F. (2) 325, cited by appellant, was the case of a woman who farmed two sections of land to wheat, through hired hands. She lived a part of the time in a shack on the farm and cooked for the men. She had no other occupation. Obviously she was a farmer.

In the case of *Leonard* v. *Bennett*, 116 F. (2) 128, cited by appellant, Bennett left his farm only temporarily and engaged in grazing livestock for wages. He went into the grazing business to support his family. All the while he had the intention of returning to the farm.

The distinction between *Hamburg Bank* v. *Kitchens*, (8th Cir.) 116 F. (2) 377, and the case at bar is shown by the following from the opinion in that case:

> "There is no suggestion that he has any occupation other than that noted. There is no proof of any other income."

On the other hand, appellant has never been a farmer. He left the farm forty-one years before he filed his petition in this case, then he was a farmer's boy, possibly doing a few chores around the place, but no one would class him as a farmer. He has lived in Adel ever since, except for two years he lived in Chicago and at no time had or claims to have had any connection with a farm until four years ago when he rented the farm which his father had owned, first from the administrator, and then from his mother. During all these years he was engaged in the lumber, hardware and implement business with his father. After his father's death, apparently not wishing to conduct a lumber business, or at least not conducting it, and having a reduced stock of hardware, he

branched out, *not* into farming but into plumbing and heating, in handling harness, together with the operation of a sawmill set up back of his store.

When he did rent the farm he did not do so for the purpose of earning a livelihood. This is shown by the fact that the rent was to be the amount of the taxes and the payments of principal and interest on the mortgage, whether the rent amounted to that much or not. The appellant guarantees that the rent will amount to enough to take care of the interest and taxes and payments on the farm, whether he makes it or not. (Record, bottom page 16, top page 17.) That this was a side issue is conceded by appellant in his argument on page 20, where he says:

> "It should be borne in mind the intent and purpose of this Debtor. He feels himself responsible for the care of his mother, an aged woman. She is liable on the debt held by Dingwell and the deficiency judgment which creditor is standing ready to grab her life estate in this farm if he can do so, by disposing of this bankruptcy proceedings." (Appellant's Argument bottom of page 20, top page 21.)

In other words his primary business is the business he has been following for forty-one years in the City of Adel as a businessman. The side issue of farming is of importance for the support of his mother and servicing the loan on the place so it will not be lost. This was a side line with him. On this activity he spent, according to his own claim, not more than fifty or sixty days in the year out of three hundred working days, not more than one-sixth of his time. The other 83% of his time was spent conducting a store and engaging in the mercantile pursuits in connection therewith of selling and servicing furnaces, selling harness, hardware, and farm seeds, together with plumbing and sawmill business.

When appellant says appellee will, if the order of the lower court is affirmed on this appeal, levy execution on and sell his mother's life estate in the farm under the deficiency judgment against her, he overlooks the law in such respect. This judgment was rendered on the 5th day of September,

1940. (R. 34.) The statutes of the State of Iowa provide that no execution can be issued on a deficiency judgment after two years from the entry thereof. Code of Iowa 1939, Section 11033.1 is as follows:

> "Execution on certain judgments prohibited. From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage or deed of trust or in any action on a claim for rent or judgment assigned by a receiver of a closed bank or rendered upon credits assigned by the receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank, the Reconstruction Finance Corporation or any other federal governmental agency to which the bank or the receiver is or may be indebted shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a set-off or counterclaim after the expiration of a period of two years from the entry thereof."

It therefore appears that there is no basis for this plea for sympathy in behalf of his mother.

If appellant was a farmer, he was entitled to a farmer's exemptions. If appellant was primarily bona fide personally engaged in farming, as he claimed, why did he not claim his farm tools and his livestock as exempt? He could have claimed all his machinery and livestock as exempt under Code Section 11760 of the Code of Iowa which is quoted hereinbefore in this argument. Instead of that, what does he do? In his schedules he claims as exempt his sawmill outfit, listed at $500.00, and wood-working tools at $150.00, a planer $50.00, and his plumbing tools $100.00. These do not sound like the implements of a husbandman.

The principal part of appellant's income was not derived from farming.

The evidence failed to show that the principal part of debtor's income is derived from farming. We believe on this question the net income must be considered, but whether net or gross, the principal part of his income comes from his business activities in the City of Adel and not from his farm-

ing operation. The gross income from his farming operations, as shown by Exhibit "D-2", the only and the final full year before he filed his petition in bankruptcy, was $2,828.09 as against other income in the sum of $5,533.98 and the net income from his farming operations was $879.09 as against net income from his business activities other than farming of $1,459.16. (See references to the Record hereinbefore set out in the statement of the case.)

If he claims that the debtor is personally engaged in farming, which he is for a few days in the year, then he fails to measure up to the provision that the principal part of his income must be derived from those operations, that is his operations in farming, because whether taken as the gross or as the net income, the principal part of his income is derived from other operations than farming. The figures given above are his own figures. They are for the last available year prior to the time he filed his petition in bankruptcy. He also presented figures for 1941, Exhibit "D-5". (Record 45.) This offer was objected to as incompetent, irrrelevant and immaterial to any issue in this case, for the reason that this hearing is based upon a petition filed by the debtor June 4, 1941. (Record 39, bottom of page.) The exhibit is undependable, because the petition in Bankruptcy was filed June 4, and any income he may have made after that date is immaterial. Accordingly the rent is not stated exactly therein and it had to be estimated. Finally, there is no amount included for rent from other property and if the same average was paid as during the preceding year and the same rate of depreciation applied to the farm machinery the income would be approximately equal from both sources. Clearly the plaintiff has not sustained the burden of establishing that his principal income was from farming.

II.

The burden of proving the facts necessary to sustain the jurisdiction of the court rested on appellant.

In a court of the United States it has been held without conflict in the authorities that the person asking relief must

establish, as part of his case, that the court has jurisdiction over the subject matter. A leading and well reasoned case announcing this rule is *McNutt* v. *General Motors Corporation*, 298 U. S. 178.

In the case of *McLaughlin Land & Livestock Company* v. *Bank of America National Trust & Savings Association*, (9th Cir.) 122 F. (2) 193, the court holds that in an agricultural bankruptcy which is based upon the claim in the petition that the debtor is a farmer under the provisions of Section 75 of the Bankruptcy Act, the burden of proving this fact rests on the debtor. A number of cases supporting the general rule that the burden of proving jurisdiction in the District Court of the United States rests upon the person asserting it are cited in the footnotes to the opinion.

In the nature of things, it must be true that the burden rests on the person who has the duty to plead and prove a fact in a court to sustain the relief prayed for.

III.

When a sheriff's deed has issued pending the proceedings and when no restraining order was in force and the debtor has lost the property in controversy, the proceedings will be dismissed.

Hardt v. *Kirkpatrick*, (9th Cir.) 91 F. (2) 875, was a case brought under Section 75 of the Bankruptcy Act. Pending the proceedings and when no injunction was in force, the property in question was sold under deed of trust. This was after the adjudication in bankruptcy. The court held that the court had no further jurisdiction and dismissed the proceedings. The court said:

> "In its opinion, the court below states that to approve the lienholder's foreclosure 'after it is done, is to sanction the flaunting of the power of the bankruptcy court—a flaunting which would destroy the effectiveness of the administration of the Bankruptcy Act.'
>
> "We cannot concur in this view, Section 75 (s) of the Bankruptcy Act itself provides a direct and orderly

means by which the court can prevent any such flaunting —the simple expedient of issuing a stay against the lienor's sale. Not having seen fit to do this, the District Court cannot complain of the flaunting of an authority that it did not choose to exercise."

In the case of *In re Cox*, (D. C. Idaho) 22 F. Sup. 925, there was a lapse of but two days between the filing of the petition in bankruptcy and the expiration of the period of redemption and when the expiration of the period had occurred a deed was issued, which the court held ousted the court of jurisdiction.

There is no deficiency judgment in this record against the bankrupt. He was not liable on the note secured by the mortgage. *McLean* v. *Federal Land Bank*, 130 F. (2) 123. The appellee claims no lien on the 140 acre farm as against appellant or his rights therein. How is he entitled to the intervention of a court of bankruptcy in protecting his mother's life estate when it is not claimed she was a farmer at all and she is not a party to this record nor in bankruptcy, nor asking such relief. The whole proceedings were not brought in good faith. They are not for the purpose of protecting a farm or farming operations, but for the purpose of keeping the appellant in possession of a store building in town and of the rent thereof.

The appellant asked for no stay order. He asked for no extension of the previous injunction pending appeal after the ruling of the lower court, ordering the proceedings dismissed. He stood by for two months and then did not appeal, but asked for a rehearing. There were seventeen days intervened between the time of the dismissing of his bankruptcy and the releasing of the injunction, during which appellant did nothing. (Record 53, 59.) On July 14, the court below entered an order setting aside the order of the Conciliation Commissioner and directed the commissioner to enter an order finding the debtor is not a farmer and proceed to wind up the administration of his estate. On July 21, 1942, the court vacated the injunction against the issuance of a sheriff's deed. It was

not until the 31st day of July that the debtor filed his application to restore the restraining order, in which he recites: "That this court did on the 21st day of July, 1942, upon the said application, grant an order, allowing the said Wilbur L. Dingwell and the Sheriff to proceed in the State Court." (Record 60.) It appears in the record and is not disputed that Wilbur L. Dingwell surrendered his certificate of purchase at Sheriff's sale to the Sheriff of Dallas County on the 22nd day of July, 1942, and received a deed to the store property in Adel described as

> The West One-Third (W⅓) of Lot One (1) and the East Twenty-Two (22) feet of Lot Two (2) Block Sixteen (16) in the Town of Adel. (Record 63.)

Under this situation the appellant has lost his right to claim that the court in bankruptcy in this proceeding should continue to stay or restore the stay against the issuance of a deed to the appellee. When the deed issued at a time when no injunction was in force, and no stay in force or applied for, the appellant's interest in the store building ceased.

IV.

This court, not possessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act.

The cases cited by appellant are cases where such prayer was included in the petition. There is no such prayer in plaintiff's petition in bankruptcy in this case. (Record 2.)

The Federal District Court is without jurisdiction of a proceeding for an agricultural composition or extension under Section 75 of the Bankruptcy Act, unless the debtor is engaged in farming operations. *Mulligan* v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.

In the case of *Baxter* v. *Savings Bank of Utica, New York*, 92 F. (2) 404, it was held that Baxter was not a farmer and that the court should retain jurisdiction in general bankruptcy, because the petition prayed for a general adjudication.

In the case at bar Skinner's petition does not, its prayer is "Wherefore Your Petitioner Prays, That his petition may be approved by the Court and proceedings had in accordance with the provisions of said section." (Section 75.) (Record 2.)

In *Cresap* v. *Equitable Life Assurance Society of the United States*, (7th Cir.) 99 F. (2) 722, dismissal of the petition in an agricultural composition in bankruptcy was held warranted where the debtor had failed either to secure a composition or to ask for an adjudication.

The case of *Securities Commission* v. *Realty Company*, 310 U. S. 434, cited by appellant, merely holds that the Securities and Exchange Commission may appear and move to dismiss proceedings under Chapter 11, leaving the debtor free to proceed under Chapter 10, if so advised. It does not hold that the court has any jurisdiction to transfer the matter to Chapter 10 and to have the pleadings revised. It does hold that the court may dismiss the case under Chapter 11.

(A) It should also be noted in the case at bar that the appellant filed a designation of the points to be relied upon for reversal, before the Circuit Court of Appeals, in accordance with Rule 75d of the Rules of Procedure. (R. bottom page 71 to top of page 72.) The question presented under (b) and (c) of the argument for petitioner was nowhere mentioned in this designation. (R. 71, 72.) It should follow as a matter of course that the claimed error cannot now be considered, otherwise the provision for designation of errors merely becomes a snare to opposing counsel and to the court.

CONCLUSION.

The debtor was not primarily engaged in farming, neither did the major part of his income, whether considered as the net income or the gross income, arise from farming operations. He makes a claim to be a farmer, not in order to protect any interest he has in any farm, but to prevent the appellee from enforcing his lien against the store building in Adel, which he has occupied with his store and where until

recently he has spent all his time until he moved into another building owned by the estate up the street.

Appellant is not liable to appellee. Appellee has no judgment against appellant and no lien against appellant's contingent remainder in the farm after the termination of his mother's life estate.

This is not a debtor case where the debtor is in distress and about to lose his farm, but is purely a case of a merchant who is trying to derive certain benefits to which he is not entitled. This is clearly shown by the offer of composition made by said debtor, in that this petition was not filed in good faith, but for the purpose of hindering and delaying Wilbur L. Dingwell, who is not even a creditor of this debtor, as the debtor offers to pay all of his obligations in full, including the mortgage on the farm real estate. Skinner is not of the class of persons for whom the act of Congress was passed.

The petitioner in his argument on page 8 of his Petition for Writ of Certiorari attempts to deceive the court in the statements made therein by comparing the net income received from his business with the gross income from the farm. The true statement appears in the opinion, 134 Federal Reporter, 2nd Series 392, on page 393, as follows:

> "His total gross income from his farming operations during the year in question was $2,828.09, while his expenses, including rent, amounted to $1,842.50, leaving a profit of $985.59. This allows no depreciation on farm machinery. His total income from his operations in town amounted to $5,533.98, and his total expenses in connection therewith amounted to $4,074.81, leaving a net profit from these operations of $1,459.17."

So it can be readily ascertained that the gross profit from the petitioner's business was greater than the gross profit from any farm operations, and the net profit was greater in his business than the net profit from any farm operations. But the petitioner does not give this court a true picture in comparing the net profit of his business with the gross profit of his farm.

Said petitioner refers in his argument to his struggle to save the loss of the farm. Again we call the court's attention that this is not a foreclosure of a farm mortgage but a mortgage on town business property which was inherited by the petitioner, and as stated by the Honorable A. K. Gardner in his opinion:

> "The facts in this case present an unusual situation. There is no deficiency judgment against the debtor, as he did not sign either the note or the mortgage. Appellee claims no lien on the 140-acre farm as against appellant, or his rights therein."

The Federal Court is one of limited jurisdiction, and the petitioner must be a farmer to invoke the jurisdiction of the court. If he is not a farmer, he does not come within the purview of Section 75, or any of the sub-sections thereof.

The facts and the law are correctly stated in the opinion in this action in the Circuit Court of Appeals, and the Writ of Certiorari asked for should be denied.

Respectfully submitted,

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(27)

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October Term, 1943

NO. 128

ALVIN EMMETT SKINNER, *Petitioner,*

vs.

WILBER L. DINGWELL, *Respondent.*

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

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In Bankruptcy

ALVIN EMMETT SKINNER, *Petitioner,*

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

In view of Respondent's charge that the record is distorted and colored by Petitioner and Respondent's presentation of the record, Petitioner files this Reply Brief.

STATEMENT OF FACTS.

In Respondent's Statement of Facts (page 2, 2) it is stressed that Petitioner is not the owner of the farm. Chap. 75 (c) provides that "A Petition may be filed by any farmer." This being true Petitioner has the same right to have the benefits of the Act if he is a farmer even though only a tenant, therefore there is no merit in that contention.

IS PETITIONER A FARMER?

Following this everything in the record tending to negative Petitioner's status as a farmer is summarized and stressed. As this Court said in the case of

First National Bank vs. Beach, 301 U. S., 435,

"In every case the totality of the facts is to be considered and appraised." The *Beach* case *supra* is the only case in which this court has construed the definition of a farmer and

Petitioner refuses to be diverted from the substance and plain English written into that decision. In the *Beach* case he kept three sheep for food, one horse for carting, tools, none purchased since 1921. Earnings from sale of poultry and eggs, $200.00, hay, $75.00, vegetables and flowers, $25.00. Total, $300.00 per year. Rentals, $3700.00. He did not cease to be a farmer because drought or wind or pests may have rendered the farm barren. Compare the record here. Ten head of live stock, chickens and hay, a tractor, cultivator, plow, planter, binder, corn binder, two wagons, spreader, two mowers, alfalfa cultivator, buck rake, hay rake, harness. (Tr. 6-7). Sales of farm products produced in 1940, $2828.09, 1941, $3497.76. (Tr. 44-5). In addition thereto produced between 6000 and 7000 bushels of corn, (Tr. 17). Testimony of Petitioner witness Ealey and Bales (Tr. 38-42) shows that Petitioner spent his time exclusively on the farm whenever necessary. In addition to his investment in farm equipment and the products of the farm the farm itself was the old home farm in which he had an estate which farm had a value of $11000.00, the Mortgage indebtedness against which he offers to pay in full, (Tr. 10-12). The value of the farm, the farm machinery and the products of the farm for a year total nearly $18000.00, by comparison his investment in other activities. Merchandise, $500.00, saw mill etc. $800.00, miscellaneous, $200.00. Total, $1500.00. True the net income from the farm was greatly reduced by rental charges, payment of interest on mortgage debt and other expenses for the purpose of saving the home farm whereby the net from the farm to him was perhaps not greater than the income from his other activities but the fact that he has the ability to render service in another field wherein his compensation is far greater than if devoted to the labor of farming for which he can secure labor far more cheaply does that change his vocation? Does the application of his labor where it counts most in saving the home farm and his other property change his vocation? Beach was not condemned because he rented the major part of his land for rentals more profitable than his tilling the same. Here Petitioner is being condemned as a farmer because of his ability to secure nearly as great returns out of his labor in connection with other investments of about $1500.00 as he is able to get out of the farm where the total investment is about $18,-

000.00. In the *Beach* case the Court say that "Receipts of income derived from farming operations would make a farmer out of someone who personally or primarily was engaged in a different activity." Would the owner of a factory directing manufacturing therein from his office located in a business district be engaged in manufacturing? If so would not a person owning the entire equipment on a farm operating the same through employees be engaged in producing products of the soil?

RESPONDENT'S REASONS FOR DENYING THE WRIT.

Respondent contended in his Brief that there is harmony among the decisions and cites many cases including the *Beach* case. The many cases cited in themselves show that there is a lack of harmony and an examination of the cases cited and recent reports shows that that issue is being more extensively litigated today than heretofore. Counsel for Respondent, R. Brown, now having two cases pending on appeal in the Eighth Circuit recently appealed the *McLean* case which with this case totals four cases in which counsel himself is employed. An examination of the cases cited in Respondent's Brief, the decisions therein rendered and the cases cited furnish most persuasive evidence that there is no harmony among the decisions. If so why all the litigation?

THE REAL ISSUE INVOLVED.

The real issue involved here is whether or not the Sheriff's Deed issued after the dismissal of the case and during appeal was a valid Deed and whether or not the Court should have retained jurisdiction and administered Bankrupts estate, otherwise than under Sec. 75-s. Those issues are discussed in Petitioner's original Brief (b) & (c) pages 9 to 13. Respondent in Reply Brief and Argument discusses those issues very briefly, pages 15 to 19. Since present counsel for Petitioner prepared his original Petition for Writ and Brief and Argument attached thereto his attention has been called to the Brief and Argument of Petitioner in the Circuit Court wherein it is contended that the Bankrupt's

estate should have been administered under Chap. 12 of the Chandler Act. In addition to the authorities heretofore cited (page 11) holding that upon appeal the case is still pending Counsel for Petitioner cites

Union Joint Stock Land Bank vs. Byerly, 310 U. S. 1. That question is under direct discussion. Not only does the dissenting opinion so hold in that case but also the majority opinion clearly so holds upon facts as they here appear. There because of no appeal having been taken after dismissal the adjudication became final. That it did not continue pending under an Act of Congress subsequently enacted. The opinion states "If it erred in that respect its action was subject to correction by appeal but not subject to attack in collateral proceedings" thereby clearly stating that if an appeal had been taken the case would have remained pending and all rights would have been saved under the provisions contained under Sec. 75-s. Here the appeal has been taken and therefore all rights were saved and the deed issued while this case is still pending is void. As heretofore contended in prior Brief under Sec. 75(n) the status of the Petitioner became that of an adjudicated Bankrupt when his original Debtor's Petition was filed. Therefore if in fact he is not a farmer entitled to the benefits of Sec. 75 his estate is still before the Court in the status of an adjudicated Bankrupt and certainly the Court can not deny its jurisdiction by dismissing the entire proceedings but must exercise its jurisdiction under the mandatory provisions of the Bankruptcy act and do so under Sec. 75-s (3) because Debtor "fails to comply with the provisions of this Section" or under Chap. 12 of the Chandler Act. Petitioner contends that if he has failed to qualify as a farmer then he has failed "to comply with the provisions of this section" and therefore is entitled to have his real estate sold with the right of redemption as provided therein but if such is not true then since the Petitioner and his estate is in the Bankruptcy Court in the status of an adjudicated Bankrupt then certainly the Court can not ignore the mandates of the Act and deny to the Petitioner the right to have his estate administered under the Bankruptcy Act as an adjudicated Bankrupt. Under the Bankruptcy Act with his estate in the jurisdiction of the Bankruptcy Court there is no authority whatever for denying

him those rights which Congress has afforded him through the Bankruptcy Act. The fact that he is not a farmer in no way denies him such rights. *Federal Land Bank vs. Nalder*, 116 Fed. (2) 1004 on 1006 so holds. Since the majority of the courts are now holding that an appeal from a dismissal does not preclude the issuance of a valid Sheriff's Deed and are holding that where a debtor is found not to be a farmer his proceedings must be dismissed and since this Court has not as yet had those issues before it it should here grant Certiorari. The cases cited in the Briefs filed in this cause clearly show there is no harmony among the decisions and clearly show that farmers throughout the United States are losing their farms because they are being denied the benefits which Congress clearly intended they should have.

If this Court refuses this Petitioner relief then he must lose his property which has a value of several thousand dollars greater than the incumbrance thereon.

Respectfully submitted,

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